Office - Supreme Court, U.S.
FILED
SEP 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS AS AMICI CURIAE

EDWARD J. HICKEY
ERICK GENSER
1125 15th Street, N.W.
Washington, D.C. 20005

JAMES ROSA
MITCHELL NOTIS
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

DAVID BARR
1899 L Street, N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

Attorneys for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

	Page
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
1. Background	5
2. Implications of Precluding Federal Employees From Bringing Bivens Actions	6
3. The "Special Factors Counselling Hesitation" Standard	10
4. The "Equally Effective" Alternative Remedy Standard	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Arnett v. Kennedy, 416 U.S. 134 8
Bell v. Wolfish, 441 U.S. 520 9
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 ..... *passim*
Brown v. GSA, 425 U.S. 820 15
Butz v. Economou, 438 U.S. 478 ..... 9, 12
Califano v. Sanders, 430 U.S. 99 15
Carlson v. Green, 446 U.S. 14 ..... 2, 3, 4, 5, 6, 7, 9, 10, 13, 14, 16
Chandler v. Roudebush, 425 U.S. 840 15
Cruz v. Beto, 405 U.S. 319 9
Davis v. Passman, 442 U.S. 228 ..... 3, 8, 10, 11, 13
Doe v. Hampton, 556 F.2d 265 (C.A.D.C.) 14
Engineers Public Service Co. v. SEC, 138 F.2d 936 (C.A.D.C.), dismissed as moot, 332 U.S. 788 15
Gravel v. United States, 408 U.S. 606 12
H.L. v. Matheson, 450 U.S. 398 10
Halperin v. Kissinger, 452 U.S. 713 7
Harlow v. Fitzgerald, —— U.S. ——, 50 L.W. 4815 (June 24, 1982) 12
Johnson v. Robison, 415 U.S. 361 15
Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 9
Meyer v. Nebraska, 262 U.S. 390 10
Nixon v. Fitzgerald, —— U.S. ——, 50 L.W. 4797 (June 24, 1982) 12
Northern Pipeline Co. v. Marathon Pipeline Co., —— U.S. ——, 50 L.W. 4893 15
Oestereich v. Selective Service Board, 393 U.S. 233 15
Parham v. J.R., 442 U.S. 584 10
Pell v. Procunier, 417 U.S. 817 9
Price v. Johnston, 334 U.S. 266 9
Public Utilities Comm'n v. United States, 355 U.S. 534 14
Rinquist v. Hampton, 582 F.2d 1138 (C.A. 7) 14
Tinker v. Des Moines Unified School District, 393 U.S. 503 10

TABLE OF AUTHORITIES—Continued

	Page
Weinberger v. Salfi, 422 U.S. 749	15
Wolff v. McDonnell, 418 U.S. 539	9
Statutes:	
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. §§ 7501-7703 (1980)	5
5 U.S.C. § 7501	7
5 U.S.C. § 7502	7
5 U.S.C. § 7503	7
5 U.S.C. § 7511	7
5 U.S.C. § 7512	7
5 U.S.C. § 7513	7
5 U.S.C. § 7531	7
5 U.S.C. § 7532	7
5 U.S.C. § 7701	7
5 U.S.C. § 7702	13
5 U.S.C. § 7703	13
5 U.S.C. § 2302	7
42 U.S.C. § 1983	8
Publ. L. 97-164, Title I, § 144, 96 Stat. 45	14
Miscellaneous:	
Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239 (1955)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-469

WILLIAM C. BUSH,

Petitioner,

v.

WILLIAM R. LUCAS,

Respondent.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS AS AMICI CURIAE

This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations, Public Employee Department, AFL-CIO, American Federation of Government Employees and the International Federation of Professional and Technical Engineers with the consent of the parties as provided for by the Rules of this Court.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations is a federation of 99 national and international unions having a total membership of approximately 14,000,000 working men and women. The Public Employee Department is an association of national and international labor unions that are affiliated with the AFL-CIO and have members employed in the public sector. The American Federation of Government Employees is a labor union representing approximately 700,000 civilian employees of nearly every major department and agency of the federal government. The International Federation of Professional and Technical Engineers is an international union comprised of 73 local unions and 26,000 members throughout the United States and Canada. Of the local unions, 19 are federal employee locals. The international union's affiliates represent, under collective bargaining agreements, some 50,000 employees, 13,000 of whom are in the federal service.

The *amici curiae* seek this opportunity to state their views to the Court because this case will determine whether federal employees, including the employees whom the amici curiae represent, will enjoy a basic right enjoyed by citizens generally—the right of access to the federal courts to redress injuries suffered by reason of actions violative of the plaintiff's constitutional rights.

SUMMARY OF ARGUMENT

1. The question in this case is whether a federal employee who has available administrative means of obtaining reinstatement and backpay for unconstitutional discipline or discharge may bring a damages action against the official or officials responsible for his or her injury. In *Carlson v. Green*, 446 U.S. 14, this Court reaffirmed the

general principle, first established in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, that citizens injured by unconstitutional actions of public officials may bring suit in federal court for damages, unless there are either "special factors counseling hesitation" or a statutory alternate, equally effective remedy specifically intended as a substitute means of redress. *Carlson*, 446 U.S. at 18-19. The court of appeals in this case, on remand from this Court with directions to consider this case in light of *Carlson*, *supra*, held that the federal employment relationship is, without more, a "special factor" precluding a damages suit.

2. The court of appeals' rationale, if accepted, would lead to wide-ranging and anomalous results. Federal employees would have no *Bivens*-type action even where no other means of recourse is available, and even where the official responsible for the unconstitutional action does not have a supervisory relationship with the employee. The constitutional rights of federal employees would be relegated to a less favored status than those not only of citizens generally but of other governmental employees particularly. And, federal employees would be singled out for special treatment as compared with other groups —for example, prisoners, as in *Carlson*, or students, or children generally—as to whom the need for broad governmental discretion has long been recognized, and as to whom particularized rules of substantive constitutional law apply.

3. *Davis v. Passman*, 442 U.S. 228, puts to rest the notion that this Court intended to impose upon federal employees a special disability in vindicating their constitutional rights. *Davis* sanctioned a *Bivens*-type action for sex discrimination in employment by a congressional employee. Obviously, such an action involves the government *qua* employer, and not the government in its gen-

eral sovereign role over private citizens. No sensible distinction can be drawn for present purposes between legislative branch and executive branch employees; indeed, the tradition of broad discretion with regard to employees is considerably stronger for members of Congress than for the executive departments and agencies. And, insofar as the Court of Appeals was relying upon a separation of powers concern, *Davis* indicates that such concerns are to be dealt with through the development of partial and absolute immunities for certain officials and for certain kinds of decisions, rather than through forbidding damages lawsuits in all instances.

4. There remains the possibility that Congress intended to supplant federal employees' *Bivens* actions with an equally effective alternative remedy. But three of the four factors on which the *Carlson* Court relied for its conclusion that the remedy there available was not equivalent to a federal court damages action obtain here as well. And, there is here in addition another problem with the statutory remedy: redress is by an administrative proceeding rather than by plenary federal court action. In the adjudication of constitutional issues, the judiciary, rather than the executive branch, has always been primary. Consequently, absent convincing evidence the view that such a remedy is equally as effective as a full judicial one ought not to be ascribed to Congress.

ARGUMENT

1. *Background.* The petitioner is a federal employee demoted by respondent because of public remarks criticizing the administration of the space flight center headed by respondent. After several years of proceedings, petitioner did succeed in obtaining, through the then-existing Civil Service Regulations,[1] an administrative reversal of his demotion, as well as backpay. In its first opinion in this case, the court of appeals held that, without more, the availability of this means of redressing an adverse personnel action precluded this damages action by petitioner, even though petitioner had alleged that by causing his demotion because of critical statements, respondent violated petitioner's constitutional free speech rights. 598 F.2d 958, 961.

After the court of appeals' first opinion herein, this Court, in *Carlson* v. *Green*, 446 U.S. 14, summarized the principles that govern the availability of a damages remedy in federal court against a federal official when a violation of constitutional rights is alleged:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S., [388,] 396; *Davis* v. *Passman*, 442 U.S. 228, 245 (1979). The second is

[1] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. §§ 7501-7703 (1980) became effective shortly after the Civil Service Commission's final action upon petitioner's case. While that Act substantially altered the statutory scheme applicable to the discipline or discharge of federal employees, the basic aspects of the former administrative review procedure here pertinent have been preserved. *See* pp. 7-8, *infra*.

> when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens*, *supra*, at 397; *Davis* v. *Passman*, 442 U.S. at 245-247. [*Carlson*, *supra*, 446 U.S. at 18-19.]

This case, then pending upon a petition for a writ of certiorari, was remanded to the Fifth Circuit for reconsideration in light of *Carlson*, *supra*. 446 U.S. 914.

On remand, the court of appeals made no attempt to justify its previous ruling regarding the pertinence of the Civil Service Commission proceedings under the strict criteria *Carlson* established for finding that the existence of an alternative remedial scheme bars a *Bivens*-type court suit against the offending government official or officials. Presumably, that court was quite aware that in terms both of Congressional intent to supplant a *Bivens* action and of the "equally effective" standard, the Civil Service Commission administrative remedy in this case was at least as deficient as the Federal Torts Claims Act possibility in *Carlson*. *See*, part 4, *infra*. Instead, the court of appeals purported to rely on the independent first branch of the *Carlson* analysis—whether there are "special factors counseling hesitation in the absence of affirmative action by Congress" (Pet. App. a-11); there is such a factor, the court below held—"the unique relationship between the Federal Government and its civil service employees" (Pet. App. a-6). Thus, the court of appeals shifted gears in an attempt to preserve its previous decision despite an intervening opinion of this Court.

2. *Implications of Precluding Federal Employees From Bringing Bivens Actions.* Despite the Fifth Circuit's protestations to the contrary (Pet. App. a-11-12), there is no escaping the conclusion that, were that court's rationale approved, federal employees would have no cause of action for damages for constitutional wrongs even in the absence

of an explicit statutory mechanism for redress.[2] To so hold could be of more than abstract importance. Even under the Civil Service Reform Act of 1978 (see n.1, *supra*), only certain types of personnel actions trigger a right to appeal to the Merits Systems Protection Board ("MSPB").[3] *See*, 5 U.S.C. §§ 7511, 7512, 7513, 7701; *compare*, e.g., 5 U.S.C. §§ 7501, 7502, 7503 (no provisions for appeal of suspensions for 14 days or less); 5 U.S.C. §§ 7531, 7532 (decision of head of certain federal agencies is final with respect to suspension and removal deemed "necessary in the interests of national security"; 5 U.S.C. § 7511 (adverse actions against probationary employees are not appealable); 5 U.S.C. § 2302 (specifying "prohibited personnel practices" with regard to personnel actions including appointments, promotions, details, transfers, reassignments, reinstatements, restorations, reemployment

---

[2] The court of appeals suggested that "the result in this case might be different if failure to recognize a *Bivens* remedy would leave Bush . . . without any remedy . . ." Pet. App. a-11-12. This statement, however, melds the two prongs of the *Carlson* analysis into one, contrary to this Court's evident intent: If the result in the case would differ according to whether or not Bush had any other remedy, the decision must rest not on "the unique relationship between the Federal Government and its civil service employees" (Pet. App. a-6), but upon the availability and character of alternative means of redress. Under *Carlson*, however, it is insufficient to defeat a *Bivens* action to show that *some* remedial scheme exists; rather, defendants must "show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 19. Thus, under *Carlson*, the "special factor counselling hesitation" must operate entirely independently of the presence or absence of Congressionally-established remedies. Otherwise, the first prong of the *Carlson* exception becomes simply a device for evading the analytical standards set by the second.

[3] In addition, there is no general statutory protection pertaining to actions against federal employees that do not result in any formal personnel action. For example, wiretapping or warrantless searches might occur without resulting in any specific adverse action. *Cf.*, *Halperin* v. *Kissinger*, 606 F.2d 1192 (C.A.D.C. 1979), aff'd by an equally divided Court, 452 U.S. 713.

and performance evaluation, but providing no right to appeal to MSPB regarding such practices).

Moreover, the court of appeals' rationale is in no way confined to a constitutional damages action against an employee's immediate or remote supervisor, or to cases concerning the sorts of ordinary personnel decisions that such supervisors are routinely called upon to make. Rather, the notion that "the role of the Government as an employer towards its employees is fundamentally different from its role as sovereign over private citizens generally" (Pet. App. a-7), would appear to embrace *any* action by an agent of the federal government against a federal employee, as long as that action is based on the victim's employee status. For example, an official responsible for a government-wide policy subjecting all federal employees to random home searches in order to assure that they are not engaged in any form of illegal activity that would affect their duties would appear to be insulated from answering in damages despite the evident unconstitutionality of such a policy.

Further, the court of appeals' "special circumstances" approach creates of federal employees a class whose constitutional rights are for some reason of lesser significance than those of *other* governmental employees, including those employed by states and municipalities and those who work for members of Congress. For, both of those varieties of governmental employees are entitled to bring damages actions in federal court against officials who treat them in their employment relationship in an unconstitutional manner—subject, of course, to whatever immunity defense may be applicable. *Davis* v. *Passman*, 442 U.S. 228; 42 U.S.C. § 1983. Yet, as a matter of substantive constitutional law, it has never been suggested that the rights of employees, vis-a-vis a governmental employer, differ according to whether that employer is the federal or state government or the legislative or executive branch. *See*, e.g., *Arnett* v. *Kennedy*, 416 U.S. 134, 160 (plurality

opinion); *id.*, at 164 (Powell, J., concurring) (amalgamating First Amendment rights of state and federal employees). And, "[f]ederal officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers . . . To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." *Butz* v. *Economou*, 438 U.S. 478, 501, 504.

Finally, and more generally, the court of appeals' approach to discovering whether there is a "special factor counselling hesitation" is one without principled limit. For example, *Carlson*, *supra*, involved a constitutional damages action by a prisoner. The relationship between the government and a prisoner is also a "unique" one in which the government has long been accorded " 'wide discretion and control.' " Pet. App. a-6-7, quoting *Arnett*, *supra*, 416 U.S. at 168 (Powell, J., concurring). *See*, e.g., *Cruz* v. *Beto*, 405 U.S. 319, 321 ("prison officials must be accorded latitude in the administration of prison affairs"); *Jones* v. *North Carolina Prisoner's Labor Union*, 433 U.S. 119, 122; *Bell* v. *Wolfish*, 441 U.S. 520, 547. Indeed, as a substantive matter, the constitutional protection accorded prisoners has long been narrowly circumscribed, in recognition that criminal conviction and incarceration justify restrictions on privacy, liberty and expression plainly unconstitutional with respect to the populace generally. *See*, e.g., *Price* v. *Johnston*, 334 U.S. 266, 285; *Pell* v. *Procunier*, 417 U.S. 817, 822; *Wolff* v. *McDonnell*, 418 U.S. 539, 555; *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. at 125. The *Carlson* Court, however, did not seize upon the plaintiff's prisoner status as a "special factor" justifying less judicial protection of those substantive constitutional rights that *are* enjoyed by prisoners. Nor did the Court intimate that other classes of individuals who interact with the government in a "unique" way justifying special substantive

constitutional rules—students, for example,[4] or children generally[5]—are to be denied a cause of action in damages against officials who violate those constitutional protections such individuals do enjoy.

3. *The "Special Factors Counselling Hesitation" Standard.* The *Carlson* Court's determination that a plaintiff's prisoner status does not preclude a *Bivens*-type claim indicates that this Court had no intention of authorizing a freewheeling inquiry as to whether the plaintiff's relationship to the government is a "special factor counselling hesitation." Any doubt in this regard is quelled by *Davis* v. *Passman*, *supra*, a case identical to this one with respect to the "special factors" prong of the *Carlson* test.[6]

Davis was a damages action for unconstitutional sex discrimination brought by a Congressional aide against the member of Congress who had employed her. As such, the case did not concern the government in "its role as a sovereign over private citizens generally," but "the role of the Government as an employer toward its employees." Pet. App. a-7. Yet, the *Davis* Court saw nothing about the employment relationship as such to suggest that courts should withhold a cause of action in damages, so that "'the ordinary remedy for an invasion of personal interests in liberty'" (*Davis*, *supra*, 442 U.S. at 245, quoting *Bivens*, *supra*, 403 U.S. at 395) would not lie.

The character of the plaintiff's employment status in *Davis* in no way justifies a less cautious judicial approach than that appropriate here. If anything, the relationship between a member of Congress and his or her rather

---

[4] *See*, e.g., *Tinker* v. *Des Moines Unified School District*, 393 U.S. 503, 507; *Meyer* v. *Nebraska*, 262 U.S. 390, 402.

[5] *See*, e.g., *H. L.* v. *Matheson*, 450 U.S. 398, 411; *Parham* v. *J.R.*, 442 U.S. 584, 602.

[6] *Davis* did differ from this one in that Davis, unlike Bush, had *no* available administrative or judicial means of vindicating in any manner her asserted constitutional right. *But see* n. 2, *supra*.

small staff is likely to be considerably more intimate than that which exists between the chief policy makers and lower-level employees in the executive branch's huge bureaucracy. Indeed, the federal government as an employer is subject to legal restrictions which fill most of one Title of the United States Code (Title 5), while the discretion of Congressional employers with regard to their employees is nearly complete.

It is possible that the court of appeals saw the factor militating against a *Bivens* remedy in the present circumstances as resting at bottom not on the nature of a government employment relationship but upon separation of powers principles. The Fifth Circuit may in other words have been suggesting that there is something untoward about the judicial branch recognizing a damages action affecting the internal affairs of a coordinate branch of our federal government.

Once again, however, *Davis* belies any such concern as one sufficient entirely to preclude a damages action for unconstitutional treatment. In *Davis*, the Court recognized that " 'the respect due coordinate branches of government' " (442 U.S. at 236, n.11, quoting *Baker* v. *Carr*, 369 U.S. 186, 217) does indeed raise "special concerns counselling hesitation" with regard to "a suit against a Congressman for putatively unconstitutional actions taken in the course of his official conduct" (442 U.S. at 246). *Davis* held, however, (*id.*) that "these concerns are coextensive with the protections afforded by the Speech or Debate Clause:"

> [I]f respondent is not shielded by the Clause, the question whether his dismissal of petitioner violated her Fifth Amendment rights would, as we stated in *Powell* v. *McCormack*, 395 U.S. 486, 548-549 (1969), "require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of respect due [a]

> coordinate branch of government' . . . *Baker* v. *Carr*, 369 U.S. 186 at 217 [442 U.S. at 235-236, n.11.]

There is no constitutional counterpart to the Speech and Debate Clause applicable to executive officials. Obviously, the absence of a " 'textually demonstrable constitutional commitment' [speaking] . . . directly to the separation of powers concerns" (*Davis*, 442 U.S. at 235, n.11, quoting *Baker* v. *Carr*, 369 U.S. at 217), inclines toward *less* judicial hesitation in affording a damages remedy to executive branch employees than in affording that remedy to Congressional aides.

Moreover, in its cases recognizing both partial and absolute immunities from damages for executive branch officials, this Court has sought to protect those officials' independence of action in a manner similar to that afforded members of Congress by the Speech and Debate Clause. *Harlow* v. *Fitzgerald*, —— U.S. ——, 50 L.W. 4815, 4818 (June 24, 1982) (comparing immunity accorded legislative aides under *Gravel* v. *United States*, 408 U.S. 606, with that available to Presidential assistants). Thus, cases such as *Butz* v. *Economou*, 438 U.S. 478, "address how best to reconcile the plaintiff's right to compensation with the need to protect the decision-making processes of an executive department" (*id.* at 503) and, to the extent deemed consistent with appropriate protection for constitutional rights, shield "officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" (*id.* at 506). *See also Harlow* v. *Fitzgerald*, *supra*, 50 L.W. at 4817, 4819-4820; *Nixon* v. *Fitzgerald*, —— U.S. ——, 50 L.W. 4797, 4801-4804 (June 24, 1982) (President has absolute immunity against damages actions because of "the President's unique office, rooted in the constitutional tradition of the separation of powers").

The *Davis* Court relying directly upon *Butz* concluded that separation of powers concerns are properly dealt with directly, by devising appropriate immunities to assure

independence to the coordinate branches of government, rather than through the blunderbuss surrogate of denying *any* cause of action for damages at all for clearly unconstitutional action:

> If respondent's actions are not shielded by the Clause, we apply the principle that "legislators ought . . . generally to be bound by [the law] as are ordinary persons." *Gravel* v. *United States*, 408 U.S. 606, 615 (1972). Cf. *Doe* v. *McMillan*, 412 U.S. 306, 320 (1973). As *Butz* v. *Economou* stated only last Term:
>
> > "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
> >
> > " 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States* v. *Lee*, 106 U.S. [196,] 220 [(1882)]." 438 U.S., at 506.
>
> [*Davis*, *supra*, 442 U.S. at 246 footnote omitted; *see also Carlson*, *supra*, 446 U.S. at 25.]

In sum, *Davis* necessarily held that neither the status of being a federal employee nor the solicitude by the judiciary due the internal affairs of the two coordinate branches of the federal government is a "special factor" precluding, without more, a constitutionally based damages action against a governmental official. This being the case, the court of appeals' decision cannot be upheld upon its own rationale.

4. *The "Equally Effective" Alternative Remedy Standard.* There remains the possibility that the result below can be sustained upon the basis of the second prong of the *Carlson* analysis—*viz.*, whether "Congress has provided an alternative remedy which it explicitly declared to be a

substitute for recovery directly under the Constitution and viewed as equally effective" (446 U.S. at 18-19).

We do not address in this brief the full parameters of the "equally effective" remedy issue, for we expect that the parties will do so. We do note, however, that three of the four "additional factors" which in *Carlson* "support[ed] [the] conclusion that Congress did not intend to limit respondent to [a statutory remedy]" (*id.* at 20-21) obtain here as well: As in *Carlson*, the remedy available to petitioner Bush (as well as that accorded federal employees under the Civil Service Reform Act of 1978) poses no threat of damages against an individual and is therefore ineffective as a deterrent; allows no punitive damages; and provides no option of trying the case to a jury.

There is also in this case, as in *Carlson*, an additional factor supporting the conclusion that the statutory remedy was not intended to supplant a *Bivens* action. Id. at 23.[7] That consideration is that except in employment discrimination cases, such remedy as is provided is an administrative one, subject to limited judicial review. 5 U.S.C. §§ 7702, 7703; *see*, for cases under previous statutory scheme, *Doe* v. *Hampton*, 556 F.2d 265 (C.A.D.C.); *Rinquist* v. *Hampton*, 582 F.2d 1138 (C.A. 7).

As a general matter, adjudication of constitutional issues in the federal system has been thought the province of the courts, not administrative agencies.[8] See *Public*

---

[7] In *Carlson*, that factor was that the Federal Torts Claim Act simply adopts the tort law of the state in which the alleged misconduct occurred, rather than providing uniform national rules. 446 U.S. at 23.

[8] As of October 1, 1982, review of MSPB decisions will not be available in the ordinary courts of appeals but only in the new Court of Appeals for the Federal Circuit. Pub. L. 97-164, Title I, § 144, 96 Stat. 45.

Utilities Comm'n. v. *United States*, 355 U.S. 534, 539; *Engineers Public Service Co.* v. *SEC*, 138 F.2d 936, 952-953 (C.A.D.C.), dismissed as moot, 332 U.S. 788; *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 242 (Harlan, J., concurring); *Johnson* v. *Robison*, 415 U.S. 361, 368; Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239, 271-275 (1955); *Weinberger* v. *Salfi*, 422 U.S. 749, 765, 767, *id.* at 794 (Brennan, J. dissenting); *Califano* v. *Sanders*, 430 U.S. 99, 109. Cf. *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, —— U.S.. ——, ——, 50 L.W. 4893, 4901 (plurality opinion). Congress outlined the reasons for this traditional assignment of responsibilities when it declined to commit the determination of employment discrimination cases, public or private, to a federal agency:

> Determination of [constitutional issues] deserves and requires non-partisan judgment. This judgment is best afforded by Federal Court judges who, shielded from political influence by life tenure, are more likely to withstand political pressure and render their decision in a climate tempered by judicial reflection and supported by historical judicial independence. [*Chandler* v. *Roudebush*, 425 U.S. 840, 851, quoting S. Rep. No. 85, 92nd Cong., 1st Sess.][9] *See also Davis, supra*, 442 U.S. at 241-242.

Given the inadequacies this statutory remedy shares with that available in *Carlson* and the additional fact that it makes an administrative agency the original adjudicator of constitutional issues, it is no more likely that Congress

---

[9] *Chandler* held that federal employees are entitled under Title VII as amended in 1972 to a trial *de novo* of all employment discrimination claims, despite the availability of internal administrative remedies. For this reason, *Brown* v. *GSA*, 425 U.S. 820, decided the same day as *Chandler* and holding that Title VII remedies for federal government employment discrimination cases are exclusive, is in no way inconsistent with our position in this case, even if *Brown* is read to preclude a *Bivens*-type remedy for discrimination.

"viewed as equally effective" as a *Bivens* suit (*Carlson*, *supra*, 446 U.S. at 19) the remedy available to Bush than that it took such a view of the nonuniform qualified traditional remedy available in *Carlson*. At least this Court should not so conclude in the absence of convincing evidence in statutory language or legislative history.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

EDWARD J. HICKEY
ERICK GENSER
1125 15th Street, N.W.
Washington, D.C. 20005

JAMES ROSA
MITCHELL NOTIS
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005

DAVID BARR
1899 L Street, N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

MARSHA BERZON
177 Post Street
San Francisco, CA 94108

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)
(Counsel of Record)

Attorneys for Amici Curiae